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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE
Petitioner

v.

FRANCES B. DAVIS,
Respondent

ON A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INDEX

PAGE

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER 1

INTEREST OF AMICUS 1

QUESTION PRESENTED 1

ARGUMENT 2

I. THERE IS NO PRIVATE RIGHT OF ACTION PROVIDED UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U.S.C. SECTION 794, WHERE CONGRESS HAS ENTRUSTED INTERPRETATION AND ENFORCEMENT OF THE STATUTE TO AN EXECUTIVE AGENCY AND PLAINTIFF HAS FAILED TO AVAIL HIMSELF OF THE ENFORCEMENT PROVISION PROMULGATED BY THE AGENCY 2

A. The application of standards enunciated in *Cort v. Ash* lead to the clear conclusion that there is no private right of action under Section 504 of the Rehabilitation Act of 1973 2

1. Is the Plaintiff one of the class for whose especial benefit the statute was enacted? 3

2. Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? 4

3. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the Plaintiff? 7

4. Is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on Federal law? 11

B. The Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978, P.L. 95-602 does not grant a private right of action under Section 504 11

C. The existing administrative remedies must be exhausted 16

II. In a decision whether to imply a private right of action under Section 504 of the Rehabilitation Act of 1973, weight should be given to the countervailing Constitutional interest on academic freedom 18

III. Broad policy considerations do not favor implication of a private right of action under Section 504 22

A. Private actions would result in differing and possibly inconsistent interpretations of Section 504 and the regulations promulgated thereunder 22

B. The Department of Health, Education, and Welfare has greater expertise in handling complex educational matters than the Federal judiciary 23

C. Excessive litigation would create a drain on the resources of hard-pressed colleges and universities 24

Conclusion 25

TABLE OF AUTHORITIES

Cases

PAGE

Barnes v. Converse College, 436 F. Supp. 635 (D.S.C., 1977) 10, 17

Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978) 19, 20, 21

Cannon v. University of Chicago, 559 F. 2d 1063 (7th Cir., 1977), cert. granted 98 S. Ct. 3142 (1978) 6, 23, 24

Cort v. Ash, 422 U.S. 66 (1975) 3, 11, 12, 13

Crawford v. University of North Carolina 440 F. Supp. 1047 (M.D.N.C., 1977) 17

Davis v. Southeastern Community College, 574 F. 2d 1158 (4th Cir., 1978) 10

Doe v. New York University, 422 F. Supp. 522 (S.D.N.Y., 1978) 16

Epperson v. Arkansas, 393 U.S. 97 (1968) 19

Goss v. Lopez, 419 U.S. 565 (1975) 20

Healy v. James, 408 U.S. 169 19

Keyishian v. Board of Regents, 385 U.S. 589 (1966) .. 19

Lau v. Nichols, 414 U.S. 563 (1974) 5

Lloyd v. Regional Transportation Authority, 548 F. 2d 1277 (7th Cir., 1977) 8, 9, 10, 16

Mayor and City Council of Baltimore v. Mathews, 562 F. 2d 1914 (4th Cir., 1977) 16

McKart v. United States, 395 U.S. 185 (1969) 16

Meyer v. Nebraska, 262 U.S. 390 (1923) 18

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) 16

National Railroad Passenger Corp. (Amtrak) v. National Association of Railroad Passengers, 414 U.S. 453 (1974) 3, 6, 8, 13

People's Housing Development Corp. v. City of Poughkeepsie, 425 F. Supp. 482 (S.D.N.Y., 1976) . 4

Rogers v. Frito-Lay Inc., 433 F. Supp. 200 (N.D. Tx., 1977) 11

Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975) 3, 13

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 18

University of California Regents v. Bakke, 98 S. Ct. 2733 (1978) 6, 11, 21, 22

Statutes

FEDERAL

15 U.S.C. §78aaa 3

18 U.S.C. §610 3

20 U.S.C. §1681 *et seq.* 5

29 U.S.C. §794 ..... 1, 2, 4, 5, 26

42 U.S.C. §1601 *et seq.* 14

42 U.S.C. §1983 20

42 U.S.C. §2000d-2 ..... 5, 11, 12

42 U.S.C. §6103 14

45 U.S.C. §501 3

Rehabilitation Act Amendments of 1978, P. L. 95-602 11

PAGE

REGULATIONS

42 Fed. Reg. 22685 (1977) 7

45 C.F.R. §80.6-10-10 7

45 C.F.R. §81.1 *et seq.* 7, 17

45 C.F.R. §84.61 ..... 7, 9

TEXTS AND OTHER REFERENCES

2 U.S. Code Cong. & Admin. News, pp. 2123, 2143 (1973) 4

4 U.S. Code Cong. & Admin. News, pp. 6373, 6390-91 (1975) 5

H.R. Rep. No. 1150, 95 Cong. 2d Sess. 40 (1978) 15

H.R. Rep. No. 1618, 95 Cong. 2d Sess. 47 (1978) 15

S. Rep. No. 855, 95 Cong. 2d Sess. (1978) 15

Bennis, *Where Have All the Leaders Gone?* 79 **Technology Rev. 5** (March/April, 1977) .. 24, 25

K. Davis, *Administrative Law of the Seventies*, §20.01 (1976) 16

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Interest of the American Council on Education

The American Council on Education (ACE) is a nonprofit corporation organized under the laws of, and located in, the District of Columbia. It is a membership organization composed of 1,302 nonprofit institutions of higher education and 177 national and regional educational associations and organizations. One of the major functions of ACE is to serve as spokesman for colleges and universities on matters of national significance. As an organization whose members include the overwhelming majority of nonprofit four-year institutions of higher education, ACE is uniquely positioned to represent the interests of the higher education community on matters of national importance such as the issue pending before this Court.

Question Presented

The sole question presented in this case is whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794, impliedly creates a private right of action, enabling individual claimants to bring civil actions under the statute against colleges and universities which receive federal financial assistance.

ARGUMENT

I. THERE IS NO PRIVATE RIGHT OF ACTION PROVIDED UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U.S.C. SECTION 794, WHERE CONGRESS HAS ENTRUSTED INTERPRETATION AND ENFORCEMENT OF THE STATUTE TO AN EXECUTIVE AGENCY AND PLAINTIFF HAS FAILED TO AVAIL HIMSELF OF THE ENFORCEMENT PROVISIONS PROMULGATED BY THE AGENCY.

A. *The application of standards enunciated in* Cort v. Ash *leads to the clear conclusion that there is no private right of action under Section 504 of the Rehabilitation Act of 1973.*

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794 provides:

> "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Although the Rehabilitation Act of 1973 provides a comprehensive scheme for vocational rehabilitation and other services for the handicapped, it does not necessarily follow that plaintiff is entitled to enforce the regulations in an individual action against a college in Federal court. On the contrary, the statute itself confers no such right of action and an analysis of the legislative history and the overall statutory and regulatory framework concerning the rights of handicapped reveals that Congress neither intended nor does sound policy require a private right of action such as plaintiff seeks to assert here.

Section 504 on its face does not confer upon plaintiff the right to enforce its provisions in an individual action. In the absence of explicit Congressional conferral of a private right of action, it is only under certain carefully circumscribed circumstances that Courts will imply such a right.

Cort v. Ash, 422 U.S. 66 (1975) (refusing to imply a private right of action by a shareholder under 18 U.S.C. Section 610, forbidding corporate contributions to presidential campaigns); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975) (refusing to imply a private right of action by an investor under the Securities Investor Protection Act of 1970, 15 U.S.C. Section 78aaa, *et seq.*); *National Railroad Passenger Corp. [Amtrak] v. National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974) (refusing to imply a private right of action to enforce Rail Passenger Service Act of 1970, 45 U.S.C. Section 501 *et seq.*).

The four factors identified by the Supreme Court in deciding whether a private remedy is implicit in a statute not expressly providing such a remedy were set forth in *Cort v. Ash*, *supra:*

> "First, is the plaintiff 'one of the class for whose especial benefit the statute was created,'—that is, does the statute create a Federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a right or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on Federal law?"
> 422 U.S. at 78 (citations omitted).

1. Is the plaintiff one of the class for whose especial benefit the statute was enacted?

Although not all handicapped individuals are entitled to the protection of Section 504 of the Act and the burden rests upon the plaintiff to demonstrate that he is an "otherwise qualified handicapped individual" *amicus* wishes to concede *arguendo* that plaintiff herein falls within the category of individuals for whose benefit the statute was enacted.

2. Is there any indication of legislative intent explicit or implicit, either to create such a remedy or to deny one?

The legislative history of 29 U.S.C. Section 794, which was enacted in 1973, contains no mention, either explicit or implicit, that Section 794 was intended to create a private right of action. The only mention of the section in the Senate and conference reports merely tracks the language of the section. *See* 2 U.S. Code Cong. & Admin. News, pp. 2123, 2143 (1973). Nor has counsel been able to find any reference to the section in the Congressional debate on the bill. There being no indication from the language of the statute or from the legislative history preceding its enactment that Congress intended to confer a private right of action to enforce 29 U.S.C. Section 794, no such right should be inferred. *Securities Investor Protection Corp. v. Barbour, supra; Amtrak v. National Ass'n of Railroad Passengers, supra; People's Housing Development Corp. v. City of Poughkeepsie*, 425 F. Supp. 482 (S.D.N.Y. 1976).

In 1974 Congress amended certain portions of the 1973 Act, although Section 794 was not among them. Nonetheless, the report of the Senate Labor and Public Welfare Committee indicates the enforcement provisions which the Senate apparently had in mind in passing Section 794 a year earlier:

> "The language of Section 504, in followig (sic) the above-cited Acts [Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d (1973) and Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681 (1973)] further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would include, where appropriate, the termination of Federal financial assistance to the recipient or other means otherwise authorized by law. Implementation of Section 504 would also include pre-grant analysis of recipients to ensure that Federal funds are not initially provided to those who discriminate against handicapped individuals. Such analysis would include pre-grant review procedures and a requirement for assurance of compliance with Section 504. *This approach to implementation of Section 504, which closely follows the models of the above-cited anti-discrimination provision, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency with the Federal government* as well as relative case of implementation, and permit a judicial remedy through a private action." (Emphasis supplied.)
> S. Rep. 1297, 93d Cong., 2d Sess., reprinted in [1975] U.S. Code Cong., & Adm. News 6373, 6390-91.

It is clear from the context that the judicial remedy referred to in the report is a judicial review of an administrative enforcement proceeding, and not an independent action by a private plaintiff which effectively would bypass the elaborate administrative mechanism contemplated by Congress and promulgated by HEW.

The two statutes referred to in the Senate report, Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d-2 (1973) and Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681 *et seq.* (1973) constitute the *model* for drafting 29 U.S.C. Section 794.

In considering whether or not the legislative intent was to create a private cause of action under Section 504; therefore, it is helpful to look at the cases discussing the private cause of action under Title VI and Title IX in light of the fact that these were the "models" for Section 504.

While the *Lau v. Nichols* opinion found at 414 U.S. 563 (1974) is sometimes cited for the proposition that the

Supreme Court recognized a private cause of action under Title VI, an examination of that case reveals that when it was first brought before the Court, it included allegations of violation of the Fourteenth Amendment and §1983. While the Supreme Court chose to depend upon the statutory basis in Title VI for their opinion rather than the Fourteenth Amendment, they did not actually discuss the issue of whether or not there was a private cause of action under Title VI. See Justice White's footnote discussing that issue in footnote 1 at page 2794 *Regents of the University of California v. Allan Bakke*, 98 S. Ct. 2733 (1978)).

Similarly, in deciding the *Bakke* case, *supra*, the Supreme Court did not hold there was a private cause of action under Title VI. Indeed, Justice White was so disturbed with this lack of decision on the jurisdictional basis, he wrote a separate opinion to set forth his view that Title VI could not and did not create a private cause of action (at pp. 2794-2798). Four other Justices apparently felt the *Bakke* case did not require a decision as to whether or not a private cause of action was available under Title VI. (See pp. 2766 and 2794.)

Similarly, with respect to Title IX, the Seventh Circuit has held that there is no private cause of action available to individuals in the case of *Cannon v. University of Chicago*, 559 F. 2d 1063 (7th Cir., 1977) *cert granted* 98 S. Ct. 3142 (1978) where that court held that there was no private cause of action under Title IX and recognized the principle enunciated in *National Railroad Passenger Corporation, supra*, that where there is no specific private cause of action granted by a statute, the courts should not expand it to provide one.

In summary, it appears evident that the legislature neither intended nor provided a private cause of action under Section 504 of the Rehabilitation Act of 1973, but rather intended that the judicial review under such Act

follow the procedures set forth in the legislative scheme for enforcement discussed below.

3. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

To allow plaintiff to maintain the instant action would do violence to the elaborate mechanism which HEW now has promulgated and which provides a comprehensive administrative framework, including procedures for compliance reports, compliance review, complaints by victims of alleged discrimination, investigation of the complaint, resolution of the complaint by informal and voluntary means, and, finally, termination by HEW of financial assistance upon non-compliance by the recipient institution. 45 C.F.R. Sections 80.6-10-10 and 45 C.F.R. 81.1 *et seq.* (1975), made applicable to Section 794 violations by 45 C.F.R. Section 84.61, 42 Fed. Reg. 22685 (May 3, 1977). Thus, HEW has an adequate mechanism to enforce 29 U.S.C. Section 794 and there is no reason for this court to assume that it would not be applied in an appropriate case. The granting of a private right of action to plaintiff in this case would upset the above-described procedural framework and would foster a piecemeal solution to a problem that clearly was intended to be solved by an administrative agency in a uniform manner.[1]

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[1]That Congress intended a uniform national approach to Section 794 enforcement, and that such enforcement should be carried out by HEW is apparent from the legislative history of the 1974 amendments to the Rehabilitation Act, 1973.

> "It is intended that Sections 503 and 504 [29 U.S.C. Sections 793, 794] be administered in such a manner that a consistent, uniform and effective Federal approach to discrimination against handicapped persons would result. Thus, Federal agencies and departments should cooperate in developing standards and policies so that there is a uniform, consistent Federal approach to these sections. The Secretary of the Department of Health, Education,

The administrative enforcement mechanism described above, contemplated by Congress and promulgated by HEW, was in effect when this suit was initiated. Yet plaintiff seeks to bypass the procedure and substitute a Federal court for the legislatively selected administrative forum. As the Supreme Court stated in the *Amtrak* case:

> "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to prescribe other remedies."
> 414 U.S. 453, 458 (1974).

In the instant case, Congress has provided, through HEW, a remedy for the violation of rights which plaintiff alleges. This court is not required to take upon itself the responsibility that Congress has placed with HEW.

The above analysis concerning the limited scope of judicial monitoring of the enforcement of 29 U.S.C. Section 794 is consistent with the Seventh Circuit Court of Appeals in *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277 (1977), where a class action was brought under Section 794 seeking relief from the defendant's contemplated purchase of busses which would be inaccessible to persons in plaintiffs' class who are confined to a wheelchair or otherwise "mobility-disabled." The court held that Section 794 implied a right to bring a class action to enforce Section 794 in absence *of administrative procedures or regulations to enforce the section*. It is important

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and Welfare, because of that Department's experience in dealing with handicapped persons and with the elimination of discrimination in other areas, should assume responsibility for coordinating the Section 504 enforcement effort and for establishing a coordinating mechanism with the Secretary of the Department of Labor to ensure a consistent approach to the implementation of Sections 503 and 504."

to note, first, that plaintiff in this suit has not brought a class action, so the case is immediately distinguishable from *Lloyd*. More important, however, *Lloyd* was decided before HEW promulgated the enforcement regulations at issue in this action. In reviewing the legislative history of Section 794, and explicitly referring to the report, cited above, of the Senate Labor and Public Welfare Committee, the court stated:

> "While the above language contemplates judicial review of an administrative proceeding as contradistinct from an independent cause of action in the Federal court, still it is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action. When administrative remedial machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the Federal courts." 548 F. 2d at 1286.

And in a footnote to the above statement, the court said:

> "[A]ssuming a meaningful administrative enforcement mechanism, the private cause of action under Section 504 should be limited to *a posteriori* judicial review."
> 548 F. 2d 1286, n. 29.

The enforcement provisions of 45 C.F.R. Section 84.61 are neither inadequate nor meaningless. The regulations promulgated by the Secretary of Health, Education, and Welfare, did not become effective until June 3, 1977. The lapse in time between enactment of the statute and the effective date of the regulations has given rise to considerable confusion as to whether a private right of action exists under the statute. The court in *Lloyd* recognized that it was "premature" to determine the question of a private right of action in the absence of a consolidated procedural enforcement regulation. We contend that the promulgation of regulations for Section 504 in 1977 limits any present judicial remedy to postadministrative review.

Thus, this court is presented with a question not decided by *Lloyd*—whether, where the administrative agency has promulgated regulations providing for the enforcement of Section 794, a plaintiff should be allowed to bypass those procedures and sue directly in Federal court.

The Fourth Circuit also found a private cause of action in *Davis v. Southeastern Community College*, 574 F. 2d 1158 (4th Cir., 1978), based upon *Lloyd, supra.* Interestingly, the *Davis* Court also cited the opinion granting a preliminary injunction in *Barnes v. Converse College*, 436 F. Supp. 635, 638 (D.S.C., 1977) as supporting the holding that there was a private cause of action under Section 504. The cause of action in *Barnes* was also initiated prior to implementation of HEW Regs. under Section 504 as were the suits in *Davis* and *Lloyd.* Subsequently the *Barnes* court held that there was no cause of action available until after the exhaustion of administrative remedies, and on a motion for reconsideration of that opinion based upon *Davis*, the District Court in *Barnes* indicated that the *Davis* opinion resulted from a case in which the action was initiated prior to the implementation of the HEW regs. and therefore stood only for the proposition that the "in-house" administrative procedures developed prior to the HEW Regs. need not be exhausted. The Court pointed out that in a footnote, the *Davis* court had specifically advised the lower court that it might consider whether the newly promulgated HEW Regulation's remedies had to be exhausted prior to the commencement of an action in Federal court.

Inasmuch as the legislative history evinces an intent to provide only for judicial review of administrative determinations, and no intent to provide for direct judicial review of a complainant's claim, and in light of well-established principles of exhaustion of administrative remedies and the doctrine of primary jurisdiction, a private right of action should not be implied.

4. Is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on Federal law?

The fourth *Cort* criterion counsels restraint in interfering with state regulation *Rogers v. Frito-Lay, Inc.*, 433, F. Supp. 200, 203 (N.D. Tx., 1977). A recent survey reveals that thirty-five states, the District of Columbia, and New York City now have statutes that prohibit discrimination against the handicapped. Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 Emory L.J. 65, 65 n. 1 (1977). Therefore, "[a]n applied Federal private right of action might . . . duplicate available state remedies and substantially increase the possibility of inconsistent judgments by Federal courts, Federal administrative agencies, state courts, and state administrative agencies." *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. at 203. Accordingly, because discrimination against qualified handicapped individuals is already protected by state law, it would hardly be appropriate to infer "a cause of action based *solely* on Federal law." *Cort v. Ash* 422 U.S. at 78. (emphasis supplied)

B. *The Rehabilitation, Comprehensive Services and Development Disabilities Act of 1978, P.L. 95-602 does not grant a private right of action under Section 504.*

Section 505 (a) (1) of P.L. 95-602 provides that the rights, remedies and procedures available under Section 504 shall be co-extensive with those available under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000(d).

Justice White in the *Bakke* decision explored in great depth the entire issue of whether there was a private cause of action under Title VI of the Civil Rights Act of 1964. After noting that four Justices are "apparently" of the view that a private right of action exists and four Justices assume it for purposes of the case, he persuasively demon-

strates that there is indeed no private right of action under Title VI.

> "A private cause of action under Title VI would, in terms both of the Civil Rights Act as a whole and that title, not be 'consistent with the underlying purposes of the legislative scheme' and contrary to the legislative intent. *Cort v. Ash*, 422 U.S. 66, 78 (1975). Title II, 42 U.S.C. §2000a *et seq.*, dealing with public accommodations, and Title VII, 42 U.S.C. §2000e *et seq.*, dealing with employment, proscribe private discriminatory conduct that as of 1964 neither the Constitution nor other Federal statutes had been construed to forbid. Both titles carefully provided for private actions as well as for official participation in enforcement. . . .
>
> The role of Title VI was to terminate Federal financial support for public and private institutions or programs that discriminated on the basis of race. Section 601, 42 U.S.C. §2000d, imposed the proscription that no person, on the grounds of race, color or national origin, was to be excluded from or discriminated against under any program or activity receiving Federal financial assistance. But there is no express provision for private actions to enforce Title VI, and it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other titles or the Act, intended silently to create a private cause of action to enforce Title VI. . . .
>
> Termination of funding was regarded by Congress as a serious enforcement step, and the legislative history is replete with assurances that it would not occur until every possibility for conciliation had been exhausted (footnote omitted). To allow a private individual to sue to cut off funds under Title VI would compromise these assurances and short circuit the procedural preconditions provided in Title VI. . . .
>
> A Congress careful enough to provide that existing private causes of action would be preserved (in Titles III and IV) would not leave for inference a vast new extension of private enforcement power. And a Congress so exceptionally concerned with the satisfaction of procedural preliminaries before confronting fund recipients with the choice of a cut-off or of stopping discriminating would not permit private parties to pose precisely the same dilemma in a greatly widened category of cases with no procedural requirements whatsoever.
>
> Significantly, in at least three instances legislators who played a major role in the passage of Title VI explicitly stated that a private right of action under Title VI does not exist. As an 'indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one,' *Cort v. Ash*, 422, U.S. 66, 78 (1975), clearer statements cannot be imagined, and under *Cort*, 'an explicit purpose to deny such cause of action [is] controlling.' Id., at 82. Senator Keating, for example, proposed a private 'right to sue' for the 'person suffering from discrimination'; but the Department of Justice refused to include it, and the Senator acquiesced (footnote omitted). These are not neutral, ambiguous statements. They indicate the absence of a legislative intent to create a private remedy. Nor do any of these statements make nice distinctions between a private cause of action to enjoin discrimination and one to cut off funds, as Mr. Justice Stevens and the three Justices who join his opinion apparently would. See n. 26 of the opinion of Mr. Justice Stevens. . . .
>
> [Justice White concludes that] This Court has always required 'that the inference of such a private cause of action not otherwise authorized by statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act." *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974). See also *Securities Investors Protection Corp. v. Barbour*, 421 U.S. 412, 418-420 (1975). A private cause of action under Title VI is unable to satisfy either prong of this test." (98 S. Ct. 2733, 2795-97)

It is our contention that an examination of recent legislative action amending another, similarly structured, civil

rights statute demonstrates that Congress is well aware of the enforcement issue and that it could have amended Section 504 expressly to create a private right of action had that been its intention.

The Age Discrimination Act of 1975, 42 U.S.C. §§1601 *et seq.*, prohibits discrimination on the basis of age in federally assisted programs and activities. The Act's operative section (§303, 42 U.S.C. §6103) is worded similarly to that of Title IX:

> "No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

In its original form, the Act dealt with the enforcement question by stating, "The provisions of this section shall be the exclusive remedy for the enforcement of the provisions of this title." §305(e), 42 U.S.C. §6105(e). In 1978, however, Congress voted to delete §305(e) and to substitute two new subsections expressly recognizing a private right of action.[2] The report of the Committee on Education

[2](e)(1) When any interested person brings an action in any United States district court for the district in which the defendant is found or transacts business to enjoin a violation of this Act by any program or activity receiving Federal financial assistance, such interested person shall give notice by registered mail not less than 30 days prior to the commencement of that action to the Secretary of Health, Education, and Welfare, the Attorney General of the United States, and the person against whom the action is directed. Such interested person may elect, by demand for such relief in his complaint, to recover reasonable attorney's fees, in which case the court shall award the costs of suit, including a reasonable attorney's fee, to the prevailing plaintiff.

(2) The notice referred to in paragraph (1) shall state the nature of the alleged violation, the relief to be requested, the court in which the action will be brought, and whether or not attorney's fees are being demanded in the event that the plaintiff prevails. No action described in paragraph (1) shall be brought (A) if at the time the action is brought the same alleged violation by the same defendant is the subject of a pending action in any court of the United States; or (B) if administrative remedies have not been exhausted.

and Labor, in a section entitled "Private Right of Action to Enforce Act," stated that it was the purpose of the House's version of the new provision "to provide that any interested person may bring an action in an appropriate district court of the United States to enjoin any violation of such act by any program or activity receiving Federal financial assistance." H.R. Rep. No. 1150, 95th Cong., 2d Sess. 40 (1978). The Senate version of the bill did not address this issue, S. Rep. No. 855, 95th Cong., 2d Sess. (1978), and the conference agreement accepted the House version, with certain modifications. See Conference Report H.R. Rep. No. 1618, 95th Cong., 2d Sess. 87 (1978).

Thus, Congress in 1978 demonstrated its awareness of the issues surrounding the authorization of a private right of action under a civil rights statute enacted some years previously, and it resolved the question through appropriate statutory language. In the case at bar, Congress in 1978 just gave individuals under Section 504 judicial review of an administrative enforcement proceeding and not an independent action by a private plaintiff which would bypass the elaborate mechanism contemplated by Congress and enacted by HEW.

(f) With respect to actions brought for relief based on an alleged violation of the provisions of this title, administrative remedies shall be deemed exhausted upon the expiration of 180 days from the filing of an administrative complaint during which time the Federal department or agency makes no finding with regard to the complaint, or upon the day that the Federal department or agency issues a finding in favor of the recipient of financial assistance, whichever occurs first. [Reprinted in Conference Report, H.R. Rep. No. 1618, 95th Cong., 2d Sess. 47 (1978).]

C. *The existing administrative remedies must be exhausted.*

In view of the now existing procedure implementing Section 504 and providing measures for remedial relief this Court should invoke the well-established rule of judicial administration that a litigant is not entitled to judicial relief until the prescribed administrative remedy has been exhausted. *McKart v. United States*, 395 U.S. 185 (1969); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); K. Davis, *Administrative Law of the Seventies*, §20.01 at 446 (1976). This doctrine is founded upon reasons soundly summarized in the *Mayor and City Council of Baltimore v. Mathews*, 562 F. 2d 1914 (4th Cir., 1977):

> "The doctrine of exhaustion has long been part of Federal jurisprudence, and is grounded upon a variety of reasons: respect for 'administrative autonomy'; a desire that administrative 'expertise and discretion' should first be brought to bear upon specialized problems; and conservation of judicial energies and resources." 562 F. 2d at 920 n. 2 (citation omitted).

Recognizing this principle, a recent decision has held that a plaintiff may not bring a private action under Section 504 of the Act without first exhausting the new HEW administrative remedies that were designed to investigate complaints of discrimination. *Doe v. New York University*, 422 F. Supp. 522 (S.D.N.Y., 1978). The plaintiff in *Doe*, a prior student at a medical school who had taken a leave of absence because of "substantial mental instability," was seeking readmission. After an investigation by the court in *Doe* revealed that the Office for Civil Rights was processing individual complaints of discrimination, the court concluded:

> "On paper, it now appears that, in the words of the Seventh Circuit in *Lloyd, supra*, 'meaningful administrative enforcement' is available for complaints under Section 504. HEW must be given at least the opportunity to develop an efficient and sensitive mechanism to deal with complaints of discrimination brought by handicapped persons before a court can make a reasoned evaluation of such a mechanism's adequacy. Especially in the context of a relatively new and broadly-worded statute like the one in question here, which could flood the courts with new litigation, administrative interpretation and guidance may be an important element in the developing construction and application of the law . . . Further, it is not unreasonable to conclude that HEW could bring a greater degree of flexibility and expertise to bear on these issues." 422 F. Supp. at 523-24.

Another decision, *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C., 1977), has also held that the "exhaustion of administrative remedies" doctrine is appropriate for grievances under Section 504 of the Act. In *Crawford*, the plaintiff was a deaf-handicapped graduate student who claimed the university failed to provide him with interpreter services. The Court in *Crawford* concluded that under the HEW regulations "any person believing himself to be the object of discrimination can file a complaint (45 C.F.R. §80.7). An investigation can be commenced and a hearing may be obtained. While a complainant may not be a party to the proceeding, he can petition to become involved in the controversy as *amicus curiae*. (45 C.F.R. §81.23)" 440 F. Supp. at 1058. See *Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C., 1977).

II. IN A DECISION WHETHER TO IMPLY A PRIVATE RIGHT OF ACTION UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973, WEIGHT SHOULD BE GIVEN TO THE COUNTERVAILING CONSTITUTIONAL INTEREST IN ACADEMIC FREEDOM.

To the extent that this Court looks outside Section 504 and its legislative history for guidance in determining whether to imply a private right of action under Section 504, the well-established constitutional interest in academic freedom should not be overlooked. "Academic freedom" in the traditional sense has been defined[3] as follows:

> "Academic freedom is the freedom of the teacher within his or her field of study. It is a safeguard that allows researchers and teachers in institutions of higher learning to pursue their work without the inhibition, prohibition, or direction of political, ecclesiastical, or other administrative authorities, regardless of their personal philosophies, behavior, or life-style. It is a liberty granted to these individuals to assure them the opportunity for examination and challenge of doctrines, dogma, and received opinions in the interest of advancing knowledge for the benefit of all society."

Academic freedom has long been a major tenet of our American democratic faith. It, like other such tenets, is embedded in our constitutional law. Academic freedom has been construed to encompass a variety of elements: freedom to provide instruction in a foreign language (*Meyer v. Nebraska*, 262 U.S. 390 (1923)); freedom to express unpopular political beliefs in the classroom (*Sweezy v. New Hampshire*, 354 U.S. 234 (1957)); freedom to refuse to take a loyalty oath (*Keyishian v. Board*

[3] "Academic Freedom," entry in Knowles, ed., *The International Encyclopedia of Higher Education* (San Francisco: Jossey-Bass, 1977), Vol. 2A, p. 24.

of Regents, 385 U.S. 589 (1966)); freedom to teach religiously unorthodox scientific theories (*Epperson v. Arkansas*, 393 U.S. 97 (1968)); and freedom of students to organize an education-related extracurricular activity (*Healy v. James*, 408 U.S. 169 (1972)).

Academic freedom in its purest sense must be grounded in the freedom of academic institutions to fulfill their missions of teaching, research and service in an environment free of governmental interference with matters of educational policy. Justice Frankfurter acknowledged this necessity when he described "the four essential freedoms" of a university as "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire, supra*, at 263.

In its recently completed term, the U.S. Supreme Court decided two cases, which reaffirm the constitutional interest in academic freedom under the First Amendment and the due process clause of the Fourteenth Amendment. In *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978), the due process clause was held not to require a formal hearing in cases of dismissal on academic grounds. And, in *University of California Regents v. Bakke, supra*, Justice Powell in finding the attainment of a diverse student body a constitutionally permissible goal under the equal protection clause, looked to the First Amendment's well-established concern for academic freedom. The Court's discussion in those cases of the appropriateness of judicial deference to educators on educational matters are of direct relevance to the question presented in the instant case.

In *Horowitz*, a student in her final year of medical school at a state university was dismissed for failure to meet required academic standards with respect to clinical practice. She brought suit under the Civil Rights Act of

1871, 42 U.S.C. §1983, alleging that the school's failure to grant her a hearing prior to her dismissal violated her rights under the due process clause of the Fourteenth Amendment. In holding that a formal hearing was not required under the circumstances of the case, the Court distinguished between dismissals for disciplinary cause, *Goss v. Lopez*, 419 U.S. 565 (1975), and dismissals for academic cause:

> The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions present in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, *the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.* (emphasis added) 435 U.S. 78, 89-90.

In his concurring opinion, Justice Powell made a similar point: "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." Id. at 96 n. 6.

Amicus submits that academic judgments concerning admission, evaluation, and dismissal are ideally within the sole purview of university faculties. Nevertheless, it is recognized that an individual's civil rights (including the right to be free of discrimination on the basis of handicap) are of a dignity to require that academic decisions affecting those rights be reviewable. Such review, however, must be limited to assuring that decisions are based on academic considerations, and not on capricious, academically irrelevant, or morally and legally reprehensible grounds. This limited constraint on academic autonomy can be effected

least intrusively and least dangerously by entrusting enforcement of the law to an administrative agency which has expertise in educational matters, with a mandate that efforts to achieve voluntary compliance precede any formal enforcement proceedings. This is precisely what Congress has done in establishing the enforcement scheme for Section 504, which should not now be supplemented by private civil actions.

In warning against "judicial intrusion into academic decisionmaking," the majority opinion in *Horowitz* stated, "Courts are particularly ill-equipped to evaluate academic performance . . . We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship." Id. at 90. Since Section 504 was primarily, if not exclusively, intended to ensure nondiscrimination on the basis of handicap among beneficiaries of federally-assisted educational programs and activities, students and applicants for admission are the principal parties protected by the statute. If a private right of action is implied under Section 504, many of the cases which will have to be decided by the Federal courts will involve academic evaluations. This would portend precisely the situation the Court was seeking to avoid in *Horowitz*.

In *University of California Regents v. Bakke, supra*, which was an action brought by an unsuccessful applicant to a state university medical school who alleged that he had been the victim of discrimination on the basis of race in violation of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment. In finding that the attainment of a diverse student body is a constitutionally permissible goal under the equal protection clause, Justice Powell looked to the First Amendment's concern for academic freedom:

> Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special

> concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. (98 S. Ct. 2733, 2753)

Justice Powell went on to state that, although a university must have wide discretion in making sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. And, in *Bakke*, the university's medical school admissions system was found to have exceeded those constitutional limitations.

In the present case, statutory rather than constitutional limitations protecting individual rights may not be disregarded. *Amicus* is not urging that statutory limitations be disregarded, but rather that, in defining and interpreting those limitations, the Court be mindful of the countervailing constitutional interest in the integrity of the academic enterprise.

III. Broad policy considerations do not favor implication of a private right of action under Section 504.

If this Court finds it necessary to look beyond Section 504, its limited legislative history, the legislative histories of related statutes, and constitutional principles in order to decide whether a private right of action should be implied under Section 504, broad considerations of public policy requires that no such right be implied.

A. *Private actions would result in differing, and possibly inconsistent, interpretations of Section 504 and the regulations promulgated thereunder.*

Section 504's operative section consists of a single sentence mandating nondiscrimination on the basis of handicap in federally-assisted educational programs and activities, with certain delineated exceptions. Regulations promulgated under Section 504 cover all aspects of a university's operations, including admissions, financial aid, housing, athletic programs, and employment. Enforcement of the regulations has been entrusted to the Department of Health, Education, and Welfare's Office for Civil Rights (OCR).

The Section 504 regulations do not contain rigid formulas as to what constitutes compliance. Rather, they are imbued with the notion of reasonableness throughout. By taking such an approach, HEW is able to maintain substantial discretion and flexibility in enforcing Section 504. If, however, a private right of action is implied, and individual complainants are permitted to bypass OCR's administrative enforcement procedures, differing views of what is "reasonable" can be expected, and there will be little hope for that uniformity of interpretation which all agree is desirable.

B. *The Department of Health, Education, and Welfare has greater expertise in handling complex educational matters than the Federal judiciary.*

Amicus believes that any policing of the process necessary to ensure equal educational opportunity can best be performed by an executive department staffed with experienced professionals who are familiar with the operation of institutions of higher education. The Seventh Circuit in *Cannon* addressing the issue of a private right of action correctly noted this underlying rationale for the doctrine of primary jurisdiction and concluded: "In this case we believe that the HEW is in a much better position to evaluate the statistics of the applicant and entering classes at the various medical schools. In addition, HEW has the benefit of comparing the local practice to the admission policies on a national level." 559 F. 2d 1063 at n. 17.

Declining to imply a private right of action couples the advantage of relying on HEW's greater expertise in

educational matters with the concomitant and not inconsequential benefit of conserving the resources and energy of the judiciary. As the court in *Cannon* stated, "Considering our already overburdened system we fail to see why we should stretch a statute by judicial interpretation to the point where it would allow additional litigation which we may not be able to properly accommodate." 559 F. 2d 1063, 1075.

C. *Excessive litigation would constitute a drain on the resources of hard-pressed colleges and universities.*

It has been urged that, because HEW's Office for Civil Rights has been unable to keep current in its processing of Section 504 complaints, a private right of action should be implied to enable individual complainants to sue educational institutions which allegedly have not complied with the Section 504 regulations. Failure of a governmental agency to carry out its charge, however, should be of no relevance in ascertaining whether Congress intended for colleges and universities to be subject to civil actions brought by private individuals to enforce Section 504.

Implication of a private right of action under Section 504 could result in a host of new lawsuits against colleges and universities. Under such circumstances the potential for litigation over admissions and employment decisions and academic evaluations would be virtually limitless. The consequence could be a serious depletion of the resources of educational institutions, resources which might better be used in meeting educational objectives. As one university president recently wrote in the alumni magazine of the Massachusetts Institute of Technology:[4]

> Aside from the merits of any particular case, the overriding fact is clear that the hands of all administrators are

[4]Bennis, *Where Have All the Leaders Gone?* 79 TECHNOLOGY REV. 5 (March/April, 1977).

> increasingly tied by real or potential legal issues. I find I must consult our lawyers over even small, trivial decisions. The university has so many suits against it (40 at last count) that my mother now calls me, "My son, the defendant."
>
> The Courts and the law are, of course, necessary to protect individual rights and to provide recourse for negligence, breach of contract, and fraud. But a "litigious society" presents consequences that nobody bargained for, not least the rising, visible expense of legal preparation plus the invisible costs of wasted time.

A private right of action should not be implied under Section 504 in the absence of a Congressional finding that it is in the national interest for colleges and universities, to expend increasing shares of their limited resources for litigation costs.

Conclusion

This case raises a Federal question of nationwide importance that requires prompt resolution, specifically, whether Section 504 impliedly creates a private right of action and, if so, whether an individual must exhaust his or her administrative remedies available under the Act and the HEW regulations. Unlike any prior case of this Court, never has so much been implied in a statute from so little. Section 504 and the implementing regulations do not expressly authorize a private right of action. The legislative history is silent. The statute envisions and the regulations provide an elaborate administrative mechanism which can ensure remedial relief for individuals. And the threat of a cutoff of Federal assistance guarantees swift enforcement of the statutory prohibition.

Therefore, *amicus curiae* urges that this court mandate the plaintiff herein exhaust the administrative remedies

available to her. In addition to the above considerations involving the clear intent of Congress, there are further policy considerations militating against implying a private right of action for handicapped persons where none existed prior to the passage of Section 794 and where Congress has not defined the scope of such a right of action. Under such circumstances, the courts will be forced to fix a statute of limitations, standards relating to venue, defenses available and remedies awardable under the new right of action. These questions likely will be answered in different ways by different courts. The more sensible approach it would seem is to leave interpretation and enforcement of the statute in the hands of HEW, with the courts being available for judicial review of agency determinations.

In summary, neither 29 U.S.C. Section 794 nor the legislative history underlying its enactment give any indication that Congress intended to confer upon an individual who has not availed himself of the administrative enforcement provisions the right to maintain a private enforcement action in the Federal courts. To hold otherwise would undermine the overall regulatory scheme for enforcing the Act and would unnecessarily add to the workload of an already overburdened Federal court system.

Respectfully submitted,

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